No. 11,016

In the United States Circuit Court of Appeals

For the Ninth Circuit

CHESTER BOWLES, Administrator,
Office of Price Administration,

Appellant,

v.

EAST ST. JOHNS SHINGLE CO., INC.,
(A Corporation),

Appellee.

Brief for Appellee

Upon Appeal from the District Court of the United States
for the District of Oregon

JAMES ARTHUR POWERS,
Attorney for Appellee

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STATEMENT

The District Court made a memorandum of decision on December 15, 1944. At that time the District Court was of the opinion that Plaintiff was entitled to recover single damages on the First Cause of Action. Four days later, on December 19, 1944, the Court entered Findings of Fact and Conclusions of Law (T. 17-19). Obviously, the District Court reconsidered the position it had taken respecting single damages to be allowed on the First Cause of Action. Appellant in its statement of the case attributes the Court's reconsideration entirely to the proposition of whether there was "improper delegation of authority" by the named Plaintiff to other persons to maintain the action. This assumption by Appellant does not seem to be entirely justified in light of the Dis-

trict Court's statements contained in the Findings of Fact and Conclusions of Law subsequently entered by the Court.

There were several factual matters in issue which the Court could have taken into consideration in dismissing the First Cause of Action. Unfortunately, Appellant did not see fit to include in the transcript of the record sufficient testimony to show the various points that were raised in connection with the First Cause of Action and which of necessity would have to be found in favor of the plaintiff below in order to sustain a recovery for the violation claimed. Appellant seeks to supplement the record to some extent by an appendix contained in his brief. However, such supplement if it is allowed by this Court is unfair because it leaves out evidence in the record as to the top price charged by the Appellee for undercoursing during what the O.P.A. referred to as the controlling period, namely, March, 1942. There was evidence in the record that Appellee sold undercoursing at the rate of $2.40 a square, which sum is higher than any of the sales referred to in the schedule attached to Appellant's First Cause of Action. The Court did not make a finding favorable to the Appellant respecting this price, and further the Court did not make a finding favorable to the Appellant that undercoursing is a shingle within the meaning of the regulation.

ARGUMENT

POINT ONE

Under the rules of this Court and the Federal Rules of Civil Procedure, if Appellant wanted to challenge the District Court's findings, Appellant should have complied with the rules and brought up sufficient record to this Court for a proper consideration thereof. The findings here are in favor of the Appellee, and they could have been entered on factual issues. Appellant does not have sufficient record before this Court to in any way support its claimed Specifications of Error No. 2 and No. 3 (their Brief, P. 8). Rule 52 (a) provides that,

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In the absence of an adequate record, it is difficult to see how the Appellant can successfully contend that the District Court's Findings and Conclusions here "were clearly erroneous."

POINT TWO

Appellant by his First Cause of Action sought to recover treble damages for alleged sales of undercoursing

above the "Maximum price established by Maximum Price Regulation 164." These sales were made between August 14, and December 10, 1943. The regulation covering the ceiling price of red cedar shingles is MPR 164. It became effective June 29, 1942. The regulations states that the administrator "has ascertained and given due consideration to the prices of red cedar shingles prevailing between October 1st and October 15th, 1941." The definition of the subject to be covered is, "Red cedar shingles means all types of shingles made from Western red cedar (Thuya plicata)." The regulation states the maximum price for red cedar shingles, classifying them as Grades I, II and III. There is no price set in the original regulation for undercoursing, and there is no catch-all provision in the original regulation requiring that application be made for a ceiling price of a by-product or a lower grade or an unclassified product.

The definition of the product covered by the regulation remained unchanged until Amendment 8 was issued on April 17, 1944, at which time the regulation was amended to include accessory items. The changed definition reads as follows: " 'Red cedar shingles' means all types of shingles and accessory items made from Western Red cedar (Thuya plicata). For purposes of this regulation, the term includes all products (other than wastes) resulting from further refinement or processing

of red cedar shingles. Thus, all red cedar shingles, shakes, hip and ridge units, et cetera, are covered whether or not those products are stained, grooved, or otherwise specially processed." And finally, the definition of the subject matter covered by regulation issued October 18, 1944, was enlarged to include by-products in the following language, "For purposes of this regulation, the term includes all products (other than wastes) resulting from further refinement or processing of Western softwood shingles."

It will be seen that undercoursing was not included within the subject of the regulation at the time the alleged violations occurred. Appellant's attorney contends that the matter is covered by Amendment No. 5, effective September 9, 1943, "(a) If a seller wishes to sell a grade or size which is not specifically priced in the price tables, or wishes to make an addition for specifications, services, or other extras for which additions are not specifically permitted, he must apply to the Lumber Branch, Office of Price Administration, Washington, D. C., for a maximum price." The foregoing catch-all provision, if that is what it is intended to be, merely relates to what is defined as a red cedar shingle in the original regulation, and it does not relate to undercoursing which never is and never can be used as a shingle. This was recognized by the OPA when it enlarged the original defini-

tion of the subject by subsequent amendments as set forth above to cover by-products made in connection with the manufacture of red cedar shingles. Webster's International Dictionary defines a shingle as "1. A piece of wood sawed or rived thin and small, with one end thinner than the other,—used in covering buildings, especially roofs, the thick ends of one row overlapping the thin ends of the row below." Undercoursing is sold with large holes in it. It is used as insulation between walls. It is cut from the knotty part of the tree, which would be a waste inasmuch as it could not be made into even the lowest grade shingle, which is No. III. Having large holes in it because of the knots, it does form a use for an undercoursing or insulation, but by the same token and because of the large knot holes, it cannot be used to turn weather and cannot be used as a shingle and does not fall within the subject matter as defined by the regulations, which were in force at the time the alleged violations occurred. It is now included in the regulations, but by amendments subsequent to the time of the alleged violations, consequently Appellant was not entitled to prevail.

In conclusion it is submitted that Appellant failed to establish a violation and the District Court was correct in denying recovery.

Respectfully submitted,

JAMES ARTHUR POWERS,
Counsel for Appellee,